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9 David Blatt, Boris Piskun, Ron Friedman,
10 Compass Financial Partners, LLC, Compass FP Corp.,
11 Compass Partners, LLC, Compass USA GP,
12 LLC, Compass USA Holding, LLC, Compass USA, LP,
13 Compass USA SPE, LLC, Economic Growth Group, Inc.,
14 Repotex, Inc.

15 UNITED STATES DISTRICT COURT
16 DISTRICT OF NEVADA

17 LEONARD C. ADAMS, et al.) Case No. 3:11-cv-00210-RCJ-VPC
18 Plaintiffs,)
19 v.) MOTION TO DISMISS
20 SILAR ADVISORS, LP, et al.,)
21 Defendants.)
22 _____

23 Defendants DAVID BLATT, BORIS PISKUN, RON FRIEDMAN, COMPASS
24 FINANCIAL PARTNERS, LLC, COMPASS FP CORP., COMPASS PARTNERS, LLC,
25 COMPASS USA GP, LLC, COMPASS USA HOLDING, LLC, COMPASS USA, LP,
26 COMPASS USA SPE, LLC, ECONOMIC GROWTH GROUP, INC., and REPOTEX, INC., by
and through their counsel of record, LAXALT & NOMURA, LTD., move the Court pursuant to
FRCP 12(b)(2) and 12(b)(6) for dismissal, in whole or in part, of Plaintiffs' claims against them.
This motion is based on the Second Amended Complaint, the following Memorandum of Points
and Authorities, and any additional information the Court may choose to consider.¹

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28 ¹ According to Plaintiffs' recent request to extend the time within which to serve Defendants Leonard Mezei
and Jay Cohen have not yet been served. (Motion, #74, 210 Case.) Therefore, they are not parties to this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Introduction.

The history of USACM bankruptcy and the prior related litigation is well known to this Court. As discussed by Plaintiffs in their operative pleading, the Second Amended Complaint, “at least” 1,188 direct lenders, “as well as other similarly situated directly lenders represented by Bickel & Brewer,” are now pursuing a self-styled follow-on lawsuit to the matter of *3685 San Fernando Lenders, LLC, et al. v. Compass USA SPE, et al.*, Case No. 2:07-cv-00892-RCJ-GWF (the “892 Case”). (Second Amended Complaint, 2:1-8, hereinafter “2AC”.)²

The Plaintiffs in this action have alleged the following claims for relief against the moving Defendants and others:³ (1) violations of the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”); (2) violations of the Nevada RICO Act; (3) elder abuse pursuant to NRS 41.1395; (4) breach of contract; (5) breach of the implied covenant of good faith and fair dealing; (6) breach of fiduciary duty; (7) conversion; (8) civil conspiracy; (9) declaratory judgment / collateral estoppel; (10) constructive trust; and (11) attorney’s fees.⁴

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² The moving Defendants have filed a Request for Judicial Notice concurrently with this Motion asking the Court to take judicial notice of certain matters contained in the Court's docket in the 892 Case. This is appropriate, as Plaintiffs have referred extensively to the 892 Case in the Second Amended Complaint herein.

³ The Court should note that at paragraph 11 of the 2AC, Plaintiffs defined “Compass” to include the following: “Defendants Compass Partners, LLC, Compass USA SPE, LLC, Compass Financial Partners, LLC (Nevada and Delaware), Compass FP Corp., Compass USA Holding, LLC, Compass USA, LP, and Compass USA GP, LLC.” (2AC, para. 11.) Plaintiffs did not define the term “Compass” to include moving Defendants David Blatt, Boris Piskun, or Ron Friedman, or any other named Defendant. Plaintiffs characterize moving Defendants Blatt, Piskun, and Friedman, as well as non-moving Defendant Leonard Mezei and Jay Cohen, as “principles of Compass,” but they fall outside of the defined term “Compass.” (2AC, para. 11, 12-16.) Plaintiffs defined moving Defendants Economic Growth Group, Inc. and Repotex, Inc., as well as non-moving Defendant Oakbridge Capital, Inc., as having Leonard Mezei as a principal, but have not included them within the defined term “Compass” either. (2AC, para. 11, 28-30).

26 4 Plaintiffs' federal RICO, Nevada RICO, elder abuse, conversion, civil conspiracy, and constructive trust
27 claims are directed at all of the moving Defendants. The breach of contract, declaratory judgment / collateral
28 estoppel and attorney fees claims are directed at Compass Partners, LLC, Compass USA SPE, LLC, Compass
Financial Partners, LLC (Nevada and Delaware), Compass FP Corp., Compass USA Holding, LLC, Compass USA,
LP, and Compass USA GP, LLC. The breach of the implied covenant of good faith and fair dealing and breach of
fiduciary duties claims are directed at those same moving Defendants, as well as Plaintiff Plaintiff.

1 **B. The standard for dismissal under Federal Rule of Civil Procedure 12(b)(6) and**
 2 **12(b)(2).**

3 FRCP 12(b)(6) provides a basis for dismissal where the complaint fails to state a claim
 4 upon which relief can be granted. Plaintiffs' Second Amended Complaint must "contain
 5 sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"
Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.
 6 544, 570 (2007)).

7 In *Iqbal*, the United States Supreme Court provided a two-step approach for district
 8 courts to apply when considering motions to dismiss. First, a court must accept as true all factual
 9 allegations in a complaint. *Id.* at 1950. Second, the court must consider whether the factual
 10 allegations in a complaint state a plausible claim for relief. *Id.* at 1950. A claim has facial
 11 plausibility when the pleaded factual content allows a court to draw the reasonable inference,
 12 based on its judicial experience and common sense, that the defendant is liable for the
 13 misconduct alleged. *Id.* at 1949-1950.

14 The Plaintiffs' pleading duty "requires more than labels and conclusions, and a formulaic
 15 recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.
 16 "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion
 17 to dismiss for failure to state a claim." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140
 18 (9th Cir. 1996). "Although courts generally assume the facts alleged are true, courts do not
 19 'assume the truth of legal conclusions merely because they are cast in the form of factual
 20 allegations.'" *Carstarphen v. Milsner*, 594 F. Supp. 2d 1201, 1207 (D. Nev. 2009) (quoting *W.*
 21 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Plaintiffs' factual allegations are
 22 insufficient to state a claim for relief against these Defendants under this standard, so all of
 23 Plaintiffs' claims against these Defendants should be dismissed as a matter of law.

24 Plaintiffs' claims against certain moving Defendants are subject to dismissal under FRCP
 25 12(b)(2) for lack of personal jurisdiction. That standard will be discussed in the context of the
 26 actual argument, which is set forth below.

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1 C. Legal argument.

2 1. The factual and procedural history of this matter.

3 As the Court is well aware, USACM filed for Chapter 11 bankruptcy on April 13, 2006.
 4 (2AC, para. 42.) The Plaintiffs in this matter allege that they were direct lenders in various loans
 5 originated and serviced by USACM. (Id., para. 43-44.) Plaintiffs allege that “effective February
 6 16, 2007 Compass acquired as the successful bidder for the “Purchased Assets.” (Id., para. 47.)

7 On May 21, 2007 --- after Compass had only been servicing the Loans for three months
 8 ---- certain direct lenders filed what later became known as the 892 Case against Compass
 9 Partners, LLC, Compass USA SPE, LLC, Boris, Piskun, David Blatt, and others alleging
 10 misconduct in the servicing of the Loans. (*Compare* 2AC para. 47, 48; *see also* Complaint for
 11 Decl. Relief and Damages, #1, Case No. 3:07-cv-00241.)⁵ Silar Advisors, LP foreclosed on
 12 certain of the Purchased Assets, including the servicing rights, on approximately September 2008
 13 under the authority of the Master Repurchase Agreement (“MRA”). (*See* 2AC, para. 53, 80, 82.)
 14 Those assets were then assigned to Asset Resolution, LLC. (Id.) Thus, Compass was only
 15 involved as the loan servicer for a period of approximately 19 months.

16 The 892 Case proceeded to trial on November 16, 2010. (2AC, para. 69.) On December
 17 14, 2010, the jury awarded 53 Plaintiffs compensatory damages in the amount of \$52,565.02
 18 jointly against Compass Partners, LLC, Compass USA, SPE, LLC, Boris Piskun, David Blatt in
 19 connection with the misappropriation and conversion claims relating to the Standard Property,
 20 Bay Pompano, and Shamrock Tower Loans. (Redacted Verdict Form, #2010, 892 Case.)⁶ The
 21 jury nevertheless awarded no damages against the Compass Defendants in connection with the
 22

23 ⁵ The 892 Case plaintiffs would eventually allege misconduct in connection with the following Loans: Bay
 24 Pompano, Binford Medical, Cabernet Highlands LLC, Charlevoix, Clear Creek Plantation, Fox Hills 216 / Eagle
 25 Meadows, Gardens Timeshare, Harbor Georgetown, La Hacienda, Lerin Hills, Marlton Square, Shamrock Tower,
 26 Standard Property, 60th Street Venture, BarUSA, Castaic II, Castaic III, Copper Sage, Fiesta Murietta, Palm Harbor
 I, Tapia Ranch, 6425 Gess, Ltd., Anchor B, LLC, Gramercy Court Condos. (Third Amended Complaint, #1499, 892
 Case; Redacted Verdict Form, #2010, 892 Case.)

27 ⁶ There has been some confusion regarding the number of Plaintiffs. Recently, counsel for Plaintiffs in the
 28 892 Case clarified that 53 persons were awarded damages, and not 52, because there were in fact two separate
 Plaintiffs named “Christina M. Kehls”. The undersigned understands and believes that the final judgment in the 892
 Case is likely to reflect this.

1 “Suttles settlement payment claims” or the “discounted payoff claims”, which involved eight
 2 distinct Loans. (Id.) The jury also awarded punitive damages against Piskun and Blatt in the
 3 amount of \$50,000 each, and against Compass Partners, LLC and Compass USA SPE, LLC
 4 jointly, in the amount of \$750,000. (Phase II Verdict Form, #2012, 892 Case.)

5 **2. Plaintiffs' allegations against “Compass”.**

6 As set forth above, Plaintiffs have alleged that certain Defendants collectively referred to
 7 as “Compass” (see footnote 1, supra) acquired the Purchased Assets through the USACM
 8 auction effectively February 16, 2007. (2AC, para. 47.) They then allege, in the same vague,
 9 collective manner, that “Compass” and “Silar” operated their “loan servicing enterprise” from
 10 their New York offices. (2AC, para. 72.) Silar allegedly “funded Compass’s acquisition of the
 11 Purchased Assets pursuant to a certain Master Repurchase Agreement (“MRA”) and various
 12 related instruments” (Id., para. 73.)

13 The specific references to the moving Defendants (as opposed to generalized allegations
 14 against “Compass”) in the Second Amended Complaint appear to be as follows: Plaintiffs
 15 contend that **Compass USA Holding, LLC** funded the \$1.8 million “third tier” of Silar’s initial
 16 funding of “Compass’s” acquisition of the Purchased Assets, which was governed by a Global
 17 Paying Agency Agreement. (Id., para. 74-75.) **Compass USA Holding, LLC** and Silar Special
 18 Opportunities Fund, LP were allegedly the limited partners in **Compass USA, LP**,⁷ and
 19 **Compass USA GP, LLC** was the general partner in **Compass USA, LP**. (Id, para. 75, 77.)

20 Plaintiffs contend that “Compass”, out of financial necessity, agreed to “extreme funding
 21 and repayment terms offered by Silar”. (Id., para. 76.) This allegedly compelled “Compass” and
 22 Silar to undertake their “wrongful loan servicing enterprise.” (Id.) They contend that this
 23 enterprise commenced sometime in March 2007. (Id., para. 165.)

24 Plaintiffs claim that **Compass Partners, LLC** assigned the Purchased Assets to
 25 **Compass USA SPE, LLC**, but purported to service the Loans through its sub-servicers,
 26 **Compass Financial Partners, LLC** (Nevada and Delaware) and **Compass FP Corp.** (Id., para.
 27

28 ⁷ Plaintiffs contend that SSOP, LLC succeeded to Silar Special Opportunities Fund, LP’s interest in Compass USA , LP in or about September 2008. (2AC, para. 75.)

1 77.) **Boris Piskun** and **David Blatt** operated “Compass” on a day-to-day basis, and were
 2 allegedly “principals.” (Id., para. 78.) Jay Cohen and **Ron Friedman** were also allegedly
 3 principals and were supposedly “involved in … the wrongful servicing enterprise operated by
 4 Compass.” (Id.) Leonard Mezei was the alleged “key principal” of “Compass,” and President of
 5 **Compass Partners, LLC.** (Id., para. 79.)

6 Plaintiffs contend that in or about June 2008, **Repotex** purchased the remaining
 7 participation interest held by the Gottex ABL Master Fund in the first tier of the three-tier
 8 financing of the Purchased Assets. **Economic Growth Group** (“EGG”) allegedly funded
 9 Repotex’s purchase, which allegedly eliminated Mezei’s personal guaranty in connection with
 10 the Purchased Assets. (Id., para. 87.)

11 Plaintiffs then alleged that “Compass” (they do not say specifically who, or which entity):

12 1. Sent misleading loan status reports to direct lenders and consent requests in
 13 connection with the Standard Property loan which did not disclose an alleged “secret side deal”
 14 (Id., para. 92-93);

15 2. “schemed to misrepresent the status and value of the Fiesta Oak Valley Loan so
 16 that “Compass, Oakbridge, and Mezei” could acquire a fractionalized interest in the Loan at a
 17 substantial discount” (id., para. 96-99);

18 3. improperly foreclosed on the Shamrock property and wrongfully retained \$2.3
 19 million of the sale proceeds (id., para. 102-104);

20 4. misinformed direct lenders in connection with the Gramercy Loan regarding the
 21 amount of certain tax liens and taxes, overstated the cost of getting the second of two five-story
 22 condominium buildings ready to lease, and wrongfully took and failed to account for cash
 23 generated by the sale of the property (id., para. 111-115);⁸

24 5. refused to accept a court-authorized discounted payoff in connection with the
 25 Lerin Hills Loan and wrongfully initiated foreclosure, resulting in a “total loss” to the Lerin Hills
 26 direct lenders (id., para. 124-126);

27
 28 8 These allegations are generally directed at “Compass,” although Plaintiffs did specifically contend that
Piskun made misstatements to direct lenders during at least three conference calls. (2AC, para. 111-115.)

1 6. failed to accept a proposed discounted pay-off in connection with the Bay
 2 Pompano Loan, demanded additional amounts from the borrower, failed to convey a second
 3 settlement offer to the direct lenders, and improperly initiated foreclosure (id., para. 127-129);

4 7. failed to convey a proposed discounted pay-off in connection with the Fox Hills
 5 and Eagle Meadows Loans, and then refused to accept approved by more than 51% of the direct
 6 lenders because it did not include various sums to which “Compass” claimed to be entitled (id.
 7 para. 133-137);

8 8. failed to accept a discounted pay-off in connection with the Bay Pompano Loan
 9 which had been approved by more than 51% of the direct lenders (d., para. 140-142);

10 9. engaged in some type of unspecified activity in connection with the Castaic Loans
 11 which caused the borrower to sue the direct lenders, Compass, and Silar (id., para. 143-147);

12 10. wrongfully pursued foreclosure in connection with the Suttles Loans (Anchor B,
 13 Gramercy, and Shamrock) in order to obtain title to Shamrock and profit from a pre-arranged
 14 sale to a third party (id., para. 148-149);

15 11. misapplied principal payments made by the borrowers in the Palm Harbor and
 16 The Gardens Loans (id., para. 148-149);

17 12. retained Citron as its Florida sub-servicer with respect to the Lake Helen Partners
 18 Loan, which led to Citron selling 7.6 acres of the property for \$200,000 after foreclosing upon it,
 19 and failing to pay the direct lenders their fractional share of the proceeds (id., para. 150-151);⁹

20 13. “caused damages ... by their unspecified actions or omissions in connection with
 21 at least” 26 other loans in addition to the others discussed previously (id., para. 152).¹⁰

22 Plaintiffs were even less specific regarding who did what to whom in their remaining
 23 allegations. Plaintiffs contend that “Defendants engaged in extensive loan servicing misconduct,

25 9 The theory against “Compass” appears to be that they negligently retained Citron. By the time Citron sold
 26 the 7.6 acres of property in April 2009, **Compass USA SPE, LLC** was no longer servicing the Lake Helen Partners
 loan, having been foreclosed out by Silar in September 2008. (See 2AC, para. 53, 80.)

27 10 Plaintiffs quite literally have failed to alleged what acts or omissions were negligent or wrongful, how those
 28 acts or omissions caused Plaintiffs to suffer damage, and specifically who is responsible for the errors and omissions
 other than “Compass, Silar, and Asset Resolution.” (2AC, para. 152.)

1 individually and in concert, to enrich themselves to the detriment of the direct lenders.” (2AC,
 2 para. 118.) They alleged that “Defendants” purported to act for the direct lenders without proper
 3 power of attorney. (Id., para. 119.) “Defendants” allegedly breached fiduciary duties by taking
 4 and retaining funds to which they were not entitled, failed to obtain at least 51% consent to take
 5 actions in connection with the Loans, failed to accept discounted payoffs when approved by
 6 more than 51% of the direct lenders on a particular loan, and failed to “evaluate and resolve the
 7 defaulted Loans in a timely manner” so as to accrue additional default interest and late charges.
 8 (Id., para. 120-123.)

9 Within Section V of the Second Amended Complaint, Plaintiffs have made still more
 10 vague, conclusory allegations against “Compass”:

11 1. “Compass and Silar” engaged in a wrongful loan servicing enterprise in violation
 12 of federal RICO. (2AC, para. 165.) Leeds and Mezei were in control of each and every aspect
 13 of the loan servicing enterprise, and “were assisted by each of the other Defendants.” (Id., para.
 14 165, 178.)¹¹

15 2. “Compass and Silar” engaged in a pattern of racketeering activity. (Id., para.
 16 166.) “Defendants regularly communicated with each other” through various means. (Id.)
 17 “Compass and Silar and their subordinates” have committed two or more predicate acts for
 18 purposes of RICO. (Id., para. 169.)

19 3. “Leeds, Mezei, Cohen, **Piskun, Blatt, Friedman**, Gracin, Tai, Windemere,
 20 Oakbridge, Citron, the Citron Defendants, SOS, Reiner, Lomazow, Great White, Orrock, Fragin,
 21 **Repotex**, and **EGG**, who were employed by or associated with the loan servicing enterprise,
 22 have participated in and conducted the affairs of the loan servicing enterprise” through a pattern
 23 of racketeering activity. (Para. 172, 183.)

24 4. “Defendants” committed acts constituting elder abuse under Nevada law (id.,
 25 para. 189); “Compass” breached the LSAs (id., para. 193); “Compass” breached the implied duty

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 27 11 How it was that Mezei --- who according to Plaintiffs has not yet been served with process --- controlled
 28 “each and every aspect of the loan servicing enterprise,” and the manner in which he was supposedly assisted “by
 each of the other Defendants” is not explained in the 2AC. Plaintiffs simply state the Defendants “communicated,”
 and postulate that these generalized allegations are true.

1 of good faith and fair dealing and fiduciary duties, for which their “principals” are also
 2 personally liable (id., para. 199, 203, 207, 210); “Defendants” committed conversion (id., para.
 3 214); “Defendants” acted in concert with the “intention of unlawfully enriching themselves to
 4 the financial detriment of the direct lenders,” thereby committing civil conspiracy (id., para.
 5 219); and “Defendants” have wrongfully taken and retained funds to which they are not entitled
 6 (id., para. 233.)

7 Aside from explaining that various of the moving Defendants invested in Silar’s
 8 acquisition loan to Compass Partners, LLC or had ownership interests in one another, Plaintiffs
 9 have failed to plead specific facts demonstrating in what actionable conduct Compass Financial
 10 Partners, LLC, Compass FP Corp., Compass USA GP, LLC, Compass USA Holding, LLC,
 11 Compass USA, LP, EGG, and Repotex, Inc. allegedly engaged. After all, it was Compass
 12 Partners, LLP that acquired the Purchased Assets, and certain of those assets were then assigned
 13 to Compass USA SPE, LLC. (2AC, para. 77.) Further, although Plaintiffs have alleged
 14 wrongful conduct against **Compass Partners, LLC** and **Compass USA SPE, LLC**, and alleged
 15 that **Piskun** and **Blatt** managed these entities’ day to day affairs, they have failed to plead that
 16 **Piskun** or **Blatt** engaged in any wrongful conduct for their own personal gain, and outside of the
 17 course and scope of their employment or agency. As for **Friedman**, the only specific
 18 involvement pled against him is that he is a “principal of Compass” (which entity remains a
 19 mystery), and that he allegedly participated in some unstated manner in the supposed pattern of
 20 racketeering activity. (2AC, para. 16, 172, 183.)

21 3. **The claims of any and all Plaintiffs added after the filing of the First**
Amended Complaint are improper, and must be dismissed.

23 Plaintiffs filed their Original Complaint and Jury Demand on March 21, 2011. (Original
 24 Complaint, #1.) They apparently exercised their right to file an amended pleading without leave
 25 of court under FRCP 15(a)(1) when they filed their First Amended Complaint and Jury Demand
 26 on March 31, 2011. (FAC, #13.) On April 13, 2011, without seeking leave of court or filing a
 27 motion, Plaintiffs filed their Second Amended Complaint, which purportedly only added or
 28 deleted Plaintiffs. (2AC, #35.) Plaintiffs then filed their “Supplement to Plaintiffs’ Second

1 Amended Complaint and Jury Demand" on May 20, 2011. (#42.) The Supplement stated that it
 2 removed some Plaintiffs as parties in the action, added others, and that it modified the damages
 3 claims of some Plaintiffs. (Id.)

4 In order to name any additional Plaintiffs subsequent to the filing of the First Amended
 5 Complaint, Plaintiffs were required to seek leave of court under Rules 15 or 21 (and related
 6 joinder Rules), or they were required to file a motion to intervene. Plaintiffs failed to properly
 7 seek leave of court to amend their pleadings, and accordingly the Court should dismiss the
 8 claims of the improperly added Plaintiffs in the Second Amended Complaint and Supplement
 9 thereto.¹² A list of those Plaintiffs who appear to have been improperly added through the
 10 Second Amended Complaint and the Supplement thereto is attached hereto as Exhibit A.¹³

11 **4. Plaintiffs, with regard to certain claims, have failed to state a claim upon**
which relief may be granted against the moving Defendants.

12 **a. Plaintiffs' federal RICO claim is deficient and should be dismissed.**

14 18 U.S.C. 1964(c) provides individuals with a civil remedy for a federal RICO violation.
 15 In order to properly plead a federal RICO cause of action, a plaintiff must allege must allege "(1)

17 ¹² It is unclear whether a party can only seek to add additional plaintiffs under Federal Rule Civil Procedure
 18 21 (and related joinder Rules), or whether parties can also be added under Rule 15. See *Texas Energy Reserve Corp.*
 19 *v. Department of Energy*, 535 F. Supp. 615, 620-621 (D. Del. 1982) (noting that some courts allow joinder only
 20 under Rule 21, but allowing addition of a plaintiff under Rule 15 once as a matter of right without leave of court
 21 before a responsive pleading was filed); *Maynard v. Bonta*, 2003 U.S. Dist. LEXIS 16201 (C.D. Cal. Aug. 29, 2003)
 22 (discussing that Ninth Circuit has not addressed issue of whether a party must always seek leave of court to add a
 23 party under Rule 21, or whether party may amend to add party once without leave under Rule 15, but allowing
 24 amendment adding party under Rule 15). If Plaintiffs seek to add parties under FRCP 21, leave of court is also
 25 required. FRCP 21 specifically provides that, "[o]n motion or on its own, the court may at any time, on just terms,
 26 add or drop a party" By itself, FRCP 21 cannot supply the standards for joinder, so reference to other rules of
 27 joinder is necessary. *Pan American World Airways, Inc. v. United States Dist. Court for Cent. Dist.*, 523 F.2d 1073,
 1079 (9th Cir. 1975). Plaintiffs did not seek leave of court to join any parties under this Rule.

23 Plaintiffs claim this is a class action lawsuit. (2AC, #35, para. 155.) Several Federal Rules of Civil
 24 Procedure governing amended pleadings and joinder of parties are potentially applicable to this case. See e.g. *Sprint*
 25 *Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 291 (2008). Additional Plaintiffs could have sought to intervene
 26 in the purported class action under FRCP 23(d) and 24. See e.g. *Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D.
 27 105, 116 (E.D. Pa 1992) (discussing intervention under Rule 23 and allowing putative class member to intervene
 28 when the class member met the requirements of Rule 24(b)); *Glass v. UBS Fin. Servs.*, 331 Fed. Appx. 452, 457 (9th
 29 Cir. 2009) (affirming district court's denial of putative class member's motion to intervene because motion was
 30 untimely under Rule 24). However, the additional Plaintiffs named in the Second Amended Complaint also failed to
 31 file a motion to properly intervene under these Rules.

28 ¹³ Alternatively, the Court should treat the Original Complaint and First Amended Complaint as abandoned,
 29 and the Second Amended Complaint as the initial pleading in this matter for all purposes.

1 conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to
 2 plaintiffs' business or property." *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2001) (internal
 3 quotations omitted). The prohibited activities are set forth in 18 U.S.C. 1962.

4 Plaintiffs must plead RICO violations with particularity under FRCP 9(b); they must state
 5 the specific time, place, and content of the alleged violations. See *Moore v. Kayport Package*
 6 *Express*, 885 F.2d 531, 541 (9th Cir. 1989) ("We have applied the particularity requirements of
 7 rule 9(b) to RICO claims.") In *Moore*, the Ninth Circuit Court of Appeals affirmed dismissal of
 8 a federal RICO claim where the plaintiffs had failed to specify the time, place, and content of the
 9 specific predicate acts upon which the RICO claim was based. *Id.* The Court explained:

10 The RICO claim in the investors' proposed third amended complaint does not attribute
 11 specific conduct to individual defendants. The claim also does not specify either the time
or the place of the alleged wrongful conduct other than to say: 'Commencing on or about
 12 October, 1982, and through and including March, 1983, within the Central District of
 California, and elsewhere, the defendants, and each of them, devised, intended to devise
 13 and carried out, a scheme to defraud...'. This is not sufficient. Allegations of fraud under
 section 1962(c) "must identify the time, place, and manner of each fraud plus the role of
 14 each defendant in each scheme." *Schreiber Distrib.*, 806 F.2d at 1401 (quoting *Lewis v.*
Sporck, 612 F. Supp. 1316, 1325 (N.D.Cal. 1985)).

15 *Id.* (emphasis supplied.) See also *Plainville Elec. Prods. Co. v. Vulcan Advanced Mobile Power*
 16 Sys., LLC, 638 F. Supp. 2d 245, 252 (D. Conn. 2009) ("PEPCO is required to state the contents
 17 of allegedly fraudulent communications, who was involved in those communications, where and
 18 when the communications took place, and PEPCO must also explain why each communication
 19 was fraudulent").

20 Although the Plaintiffs identify several loan transactions and claim that "Compass"
 21 utilized mail and wire communications in order to further a vague scheme to profit at the expense
 22 of the direct lenders, Plaintiffs fail to identify with adequate particularity the specific role of each
 23 Defendant in each scheme, each Defendant's specific conduct, and why that conduct was
 24 fraudulent. Plaintiffs contend that Compass Partners, LLC acquired the Purchased Assets and
 25 assigned them to Compass USA SPE, LLC. (See 2AC, para. 47, 77.) Piskun and Blatt managed
 26 the daily affairs of the companies and engaged in certain communications in furtherance of the
 27 alleged enterprise. (Id., para. 78.) EGG allegedly funded Repotex's purchase of the remaining
 28 participation interest held by the Gottex ABL Master Fund in the first tier of the three-tier

1 financing of the Purchased Assets. (Id., para. 87.) With respect to Repotex, Inc., Plaintiffs
 2 alleged that it had a role in the funding of the monies lent by Silar to Compass Partners, LLC to
 3 acquire the Purchased Assets, but did not describe Repotex's involvement or role in any alleged
 4 predicate act of wrongdoing, other than to say that its purchase of the remaining participation
 5 interest held by the Gottex ABL Master Fund eliminated Mezei's personal guaranty. (Id.) The
 6 same is true with respect to Friedman, Compass FP Corp., Compass USA GP, LLC, Compass
 7 USA Holding, LLC, and Compass USA, LP. They are vaguely alleged to be members or
 8 shareholders in other Compass entities, or in the case of Friedman a "principal" of unspecified
 9 "Compass" entities, but the pleadings lack any specifics regarding the manner in which they
 10 were involved in the alleged wrongful enterprise. (Id., para. 11, 16, 74-9, 87).

11 Plaintiffs' allegations regarding the alleged predicate mail and wire communications fail
 12 to sufficiently identify with particularity the Defendants involved in the communications (with
 13 the exception of Piskun at paragraph 113 of the 2AC). In paragraph 113, where Plaintiffs have
 14 identified three specific communications by Piskun, they fail to sufficiently allege conduct
 15 demonstrating that the Piskun intended to further an endeavor that would satisfy the elements of
 16 a substantive criminal offense. See *Salinas v. United States*, 522 U.S. 52, 65 (1997) ("A
 17 conspirator must intend to further an endeavor which, if completed, would satisfy all of the
 18 elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or
 19 facilitating the criminal endeavor.")

20 Plaintiffs have also failed to plead facts supporting their generalized allegations of a
 21 pattern of racketeering activity. Under 18 U.S.C. 1961(5), such a pattern "requires at least two
 22 acts of racketeering activity, one of which occurred after the effective date of this chapter and the
 23 last of which occurred within ten years (excluding any period of imprisonment) after the
 24 commission of a prior act of racketeering activity." Pursuant to 18 U.S.C. 1961(1), the predicate
 25 acts of racketeering activity include mail fraud and wire fraud.

26 In *Does 1-60 v. Republic Health Corp.*, 669 F. Supp. 1511, 1517 (D. Nev. 1987), this
 27 District Court explained:

28

[I]n order to allege mail or wire fraud, the plaintiffs must allege that (1) the perpetrator knowingly participated in a scheme to defraud, (2) the perpetrator used or caused the use of the United States mails or wires for the purpose of carrying out the scheme, and (3) the perpetrator did so with the intent to defraud. The plaintiffs have not pled these elements. On this basis, also, the complaint is inadequate.

Furthermore, as to claim one, the plaintiffs' pleading of a conspiracy is insufficient. The conspiracy is alleged in general sweeping terms and does not apprise the defendants of the roles they are alleged to have played in the conspiracy.

Id. at 1517, internal citations omitted.)

Plaintiffs' general allegations that "Compass" engaged in acts to defraud Plaintiffs are insufficient to demonstrate that the individual moving Defendants specifically intended to defraud the Plaintiffs, that they knowingly participated in a larger scheme to defraud, or that they used the mails or wires for the purpose of furthering such a scheme as opposed to the furtherance of alleged isolated wrongful acts. Moreover, the Plaintiffs have not identified the specific roles of each moving Defendant in the alleged conspiracy to further the scheme. Therefore, they cannot demonstrate the predicate acts of racketeering activity under 18 U.S.C. 1961.

Plaintiffs' RICO claim also fails to satisfy the "continuity" requirement. The United States Supreme Court has held that to establish a RICO pattern, it is not sufficient to simply show that the predicate crimes are related, but a plaintiff must also show that they "amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989). The Court explained:

"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. It is, in either case, centrally a temporal concept -- and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with longterm criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated.

H. J. Inc., 492 U.S. at 241-242 (internal citation omitted) (emphasis supplied). In this case, we have an alleged scheme that did not commence until sometime in "March 2007" (2AC, para.

1 165) and, with respect to the moving Defendants, terminated no later than Silar's exercise of its
 2 rights under the MRA in September 2008. (*See* 2AC, para. 53, 80, 82.) The time period
 3 involved was only approximately 18 months, and there is no threat of future alleged criminal
 4 conduct because Compass has not been the servicer for nearly three years, and will not be again.
 5 Thus, Plaintiffs have failed to demonstrate a pattern of continuing RICO activity.

6 In *Plainville Elec. Prods. Co. v. Vulcan Advanced Mobile Power Sys., LLC*, 638 F. Supp.
 7 2d 245, 253 (D. Conn. 2009), the court explained that alleged acts committed over a period of
 8 less than two years was not sufficient to establish closed-ended continuity under those facts.
 9 *Id.* at 253. Furthermore, the relevant period is not the period of time during which the scheme
 10 allegedly operated, but rather the period of time during which the predicate RICO activity was
 11 taking place. *Id.* at 253, citing *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184
 12 (2nd Cir. 2008.) “Although the court of appeals ‘ha[s] not viewed two years as a bright-line
 13 requirement, it will be rare that conduct persisting for a shorter period of time establishes closed-
 14 ended continuity, particularly where, . . . [t]he activities alleged involved only a handful of
 15 participants and do not involve a complex, multi-faceted conspiracy.’” *Id.* at 253, quoting *Spool*,
 16 520 F.3d at 184.

17 In this case, Plaintiffs have alleged various allegedly wrongful mailings and telephone
 18 calls by the moving Defendants on 3/23/07 (para. 96, 101), 4/4/07 (para. 98), 5/18/07 (para. 93),
 19 6/8/07 (para. 129), 9/27/07 (para. 113), 1/14/08 (para. 113), 1/28/08 (para. 113), 2/15/08 (para.
 20 103). Furthermore, it does not appear that Plaintiffs allege that every one of these
 21 communications was knowingly false. (*See* 2AC, para. 103, 129.)¹⁴ Even setting that issue
 22 aside, the span of time during which these alleged predicate acts by the “Compass” Defendants
 23 occurred is approximately 11 months. As discussed in *Plainville*, this is insufficient to establish
 24 closed-end continuity.

25 The *Plainville* Court also found that open-ended continuity had not been established
 26 because the defendants conducted an inherently legitimate business enterprise, and the complaint

27
 28 ¹⁴ Plaintiffs also allege deceptive communications in September 2009, but those allegedly involve non-
 moving Defendants Asset Resolution, Reiner, and SOS and took place after Silar had already foreclosed on the
 Purchased Assets under the MRA in September 2008. (*See* 2AC, para. 108, 53, 80, 82.)

1 did not suggest any threat of ongoing criminal activity. *Id.* at 255. The same is true here: There
 2 is nothing inherently inappropriate about the servicing of fractionalized development loans.
 3 Compass Partners, LLC purchased the servicing rights through a court-supervised bankruptcy
 4 auction. (2AC, 47.) Nor is there any threat of ongoing criminal activity, because the moving
 5 Defendants have no continuing role in the servicing of the subject Loans.

6 Plaintiffs have failed to adequately plead a cognizable federal RICO claim against the
 7 moving Defendants. Accordingly, the Court should dismiss this claim as to each moving
 8 Defendant.

9 **b. Plaintiffs' Nevada RICO claims should be dismissed.**

10 Plaintiffs have also asserted a Nevada RICO claim against all moving Defendants. "Like
 11 their federal counterparts, Nevada's anti-racketeering statutes provide for a civil cause of action
 12 for injuries resulting from racketeering activities under which a plaintiff may recover treble
 13 damages, attorney's fees and litigation costs. See NRS 207.470." *Hale v. Burkhardt*, 104 Nev.
 14 632, 634, 764 P.2d 866, 867 (1988).

15 The term "racketeering activity" means "engaging in at least two crimes related to
 16 racketeering that have the same or similar pattern, intents, results, accomplices, victims or
 17 methods of commission, or are otherwise interrelated by distinguishing characteristics and are
 18 not isolated incidents" NRS 207.390 (emphasis supplied). Pursuant to NRS 207.360, "crime
 19 related to racketeering" means the commission of, attempt to commit or conspiracy to commit,
 20 certain enumerated crimes, including "[t]aking property from another under circumstances not
 21 amounting to robbery," "[e]mbezzlement of money or property valued at \$250 or more," and
 22 "[o]btaining possession of money or property valued at \$250 or more, or obtaining a signature
 23 by means of false pretenses"¹⁵

24

25 ¹⁵ The crime of "embezzlement" is defined in relevant part by NRS 205.300 as follows: "1. Any bailee of any
 26 money, goods or property, who converts it to his or her own use, with the intent to steal it or to defraud the owner or
 27 owners thereof and any agent, manager or clerk of any person, corporation, association or partnership, or any person
 28 with whom any money, property or effects have been deposited or entrusted, who uses or appropriates the money,
 property or effects or any part thereof in any manner or for any other purpose than that for which they were
 deposited or entrusted, is guilty of embezzlement, and shall be punished in the manner prescribed by law for the
 stealing or larceny of property of the kind and name of the money, goods, property or effects so taken, converted,
 stolen, used or appropriated." (Emphasis supplied.)

1 For a plaintiff to recover under Nevada RICO, three conditions must be met: (1) the
 2 plaintiff's injury must flow from the defendant's violation of a predicate act; (2) the injury must
 3 be proximately caused by the defendant's violation of the predicate act; and (3) the plaintiff must
 4 not have participated in the commission of the predicate act. *Allum v. Valley Bank*, 109 Nev.
 5 280, 283, 849 P.2d 297, 299 (1993). There is no pattern/continuity requirement as is required
 6 under federal law. *Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801, 811 (1998).

7 In *Hale v. Burkhardt*, 104 Nev. 632, 634, 764 P.2d 866, 867 (1988), the Nevada Supreme
 8 Court affirmed dismissal of a state RICO claim. A real estate broker plaintiff entered into an oral
 9 agreement with defendants under which plaintiff was to assist the defendants in purchasing an
 10 entire city block in Reno for a development project. *Id.* at 637, 867. The purchase was
 11 apparently completed, but defendants did not pay plaintiff. *Id.* at 637, 867. The plaintiff alleged
 12 that defendants obtained services, money or property by false pretenses. *Id.* The trial court
 13 dismissed the Nevada RICO claim under NRCP 12(b)(5), and the Supreme Court affirmed,
 14 holding that the plaintiff failed to sufficiently allege with particularity the alleged criminal acts
 15 supporting the RICO claim:

16 Even had the narration of the three supposed "schemes" stated the elements of a false
 17 pretenses crime and thus charged criminal violation of NRS 205.380, the pleading lacks
 18 the kind of specificity that is called for in making such allegations. Not only is there a
 19 basic failure to articulate any misrepresentation on the part of respondents, there is no
 representations are claimed to have been made.

20 The federal courts have demanded specificity in pleading the racketeering acts in a civil
 21 RICO cause of action. As in federal jurisprudence, an action brought under NRS
 22 207.470, although civil in nature, nevertheless may involve the pleading of racketeering-
 23 related predicate crimes; and there is no reason the requirement of pleading with
 24 particularity should not apply in state actions just as it does in the federal context.

25
 26 The crime of obtaining money, property, rent or labor by false pretenses is defined in relevant part as
 follows by NRS 205.380: "1. A person who knowingly and designedly by any false pretense obtains from any other
 27 person any chose in action, money, goods, wares, chattels, effects or other valuable thing, including rent or the labor
 28 of another person not his or her employee, with the intent to cheat or defraud the other person, is a cheat, and, unless
 otherwise prescribed by law, shall be punished: (Emphasis supplied.)

1 While Nevada has yet to deal with the explosion of RICO litigation experienced in the
 2 federal courts, we nevertheless have a present concern that civil RICO actions be pleaded
 3 with sufficient specificity because of the very serious consequences attached to the
 4 allegations of criminal conduct that are the essence of this kind of law suit. Not only is a
 5 civil RICO defendant accused of committing a criminal offense -- which carries with it
 6 the potential for considerable social stigma -- such a defendant is also confronted with the
 7 possibility of an adverse treble damages judgment.

8 Because the present civil RICO action, despite its fundamentally civil nature, (1) involves
 9 pleading the commission of racketeering-related crimes and (2) permits the levy of
 10 serious punitive consequences, the same degree of specificity is called for as in a criminal
 11 indictment or information. A civil RICO pleading must, in that portion of the pleading
 12 which describes the criminal acts that the defendant is charged to have committed,
 13 contain a sufficiently "plain, concise and definite" statement of the essential facts such
 14 that it would provide a person of ordinary understanding with notice of the charges.

15 *Id.* at 637-638, 869-970 (internal citations omitted).¹⁶

16 Plaintiffs must allege with particularity two or more predicate acts constituting fraud,
 17 embezzlement, or wrongfully obtaining funds from the Plaintiffs short of circumstances
 18 amounting to robbery. Each of the crimes alleged by Plaintiffs in connection with the state law
 19 racketeering claim necessarily involves demonstrating intent by the Defendants to defraud the
 20 Plaintiffs.

21 Plaintiffs allege in conclusory fashion, that Compass and Silar engaged in a wrongful
 22 loan servicing enterprise, that Leeds and Mezei were (somehow) in control of "each and every
 23 aspect" of the enterprise, and that they were "assisted by each of the other Defendants." (2AC,
 24 para. 178.) Similar to the Plaintiffs in *Hale*, Plaintiffs fail to identify the specific acts that each
 25 Compass entity engaged in that amounted to one of the criminal predicate acts described above.
 Instead, they have presented conclusory allegations concerning commission by "Compass" and
 "Silar" of embezzlement and false pretenses. (*Id.*, para. 179-180.) They then contend, with little
 factual detail, that the various moving Defendants and others "have participated in and conducted

26 ¹⁶ See also *Cummings v. Charter Hosp.*, 111 Nev. 639, 646-647, 896 P.2d 1137, 1141-1142 (1995) ("The
 27 complaint does not state, in any detail, the circumstances surrounding the allegations, nor does it specify with
 28 particularity what conduct is complained of and when and where the conduct occurred. The district court did not err
 in dismissing the patients' civil racketeering claim for failure to plead the claim with sufficient particularity"); *Vo v.
 Am. Brokers Conduit*, 2010 U.S. Dist. LEXIS 116274 (D. Nev. Oct. 29, 2010) (finding that the plaintiff failed to
 sufficiently plead a claim for civil racketeering).

1 the affairs of the loan servicing enterprise through the racketeering activity described above.”
 2 (Id., para. 183.)

3 As explained in the *Hale* decision, the Defendants are entitled to notice of the “essential
 4 facts” regarding what they allegedly did in violation of Nevada’s civil racketeering laws.
 5 Plaintiffs’ Second Amended Complaint falls short. Based on the foregoing, the Court should
 6 dismiss Plaintiffs’ Nevada RICO claim for relief with prejudice.

7 c. **Plaintiffs have failed to state a claim for elder abuse pursuant to NRS**
 8 **41.1395.**

9 Plaintiffs allege the moving Defendants and others have committed “elder abuse”
 10 within the meaning of NRS 41.1395 against certain of the Plaintiffs. (2AC, para. 188-190.)
 11 Plaintiffs’ allegations appear to be directed at alleged “exploitation” of those Plaintiffs who
 12 qualify as “older persons” because they were over the age of 60 at the time of the alleged
 13 wrongful conduct. NRS 41.1395 provides, in relevant part, as follows:

14 **Action for damages for injury or loss suffered by older or vulnerable person from**
 15 **abuse, neglect or exploitation; double damages; attorney's fees and costs.**

16 1. Except as otherwise provided in subsection 3, if an older person or a vulnerable
 17 person suffers a personal injury or death that is caused by abuse or neglect or suffers a
 18 loss of money or property caused by exploitation, the person who caused the injury, death
 19 or loss is liable to the older person or vulnerable person for two times the actual damages
 20 incurred by the older person or vulnerable person. ...

21 4. For the purposes of this section: ...

22 (b) “Exploitation” means any act taken by a person who has the trust and
 23 confidence of an older person or a vulnerable person or any use of the
 24 power of attorney or guardianship of an older person or a vulnerable
 25 person to:

26 (1) Obtain control, through deception, intimidation or undue influence,
 27 over the money, assets or property of the older person or
 28 vulnerable person with the intention of permanently depriving the
 29 older person or vulnerable person of the ownership, use, benefit or
 30 possession of that person's money, assets or property; or

31 (2) Convert money, assets or property of the older person with the
 32 intention of permanently depriving the older person or vulnerable

person of the ownership, use, benefit or possession of that person's money, assets or property. ...

(d) "Older person" means a person who is 60 years of age or older.

(Emphasis supplied.) Only two reported cases discuss the applicability of this statute: A June 17, 2011 federal district court opinion in which Judge Mahan denied a motion to dismiss in a case involving the sale of reverse mortgages, and an August 17, 2011 federal district court opinion in which Judge Reed granted dismissal of an elder abuse claim in an insurance bad faith case. *Jung v. BAC Home Loans Servicing, LP*, 2011 U.S. Dist. LEXIS 64802 (D. Nev., June 17, 2011); *Deruise v. Progressive Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 92433 (D. Nev., Aug. 17, 2011). In the *Deruise* case, the Court declined to unreasonably stretch the intended purpose of NRS 41.1395 so as to allow the plaintiff to maintain a claim against a claims adjuster:

The claim that Plaintiffs cling to in order to keep Defendant Johnson within the case is the fifth claim for exploitation of an older or vulnerable person in violation of Nev. Rev. Stat. 41.1395. ...

Plaintiffs have failed to allege any facts that fit the statutory requirements of a violation of Nev. Rev. Stat. 41.1395 for exploitation of an older or vulnerable person. It is not alleged that Defendant Johnson was a "person who has the trust and confidence" of DeRuise, or that Johnson ever attempted to obtain control over money, assets, or property of the Plaintiffs. ... The most that Plaintiffs can allege is that Plaintiffs are older or vulnerable persons as defined in Nev. Rev. Stat. 41.1395(4)(d) and (e). Plaintiffs' argument that the actions of Johnson constitute exploitation as set forth in Nev. Rev. Stat. 41.1395 because Johnson intentionally delayed and withheld policy benefits is simply not in accordance with the statutory definition of exploitation contained in Nev. Rev. Stat. 41.1395.

We can see no reason to find that delaying or withholding insurance policy benefits of an elderly person should constitute a separate tort of exploitation. While neither side has turned up any case explicitly dealing with a violation of Nev. Rev. Stat. 41.1395, we suspect that the provision seeks to punish behavior very different from that of Defendant Johnson's in this case.

Each Plaintiff must show that he or she was age 60 or older at the time of the wrongful conduct which caused him or her to “suffer” the effects. See NRS 41.1395(4)(d) (defining “older person” as age 60 or older), and 41.1395(1) (“... if an older person or a vulnerable person

1 suffers ... a loss of money or property caused by exploitation)¹⁷ Even with respect to those
 2 Plaintiffs who were age 60 or older at the time of the alleged wrongful conduct, this claim fails
 3 on its face. In order to demonstrate “exploitation,” the Plaintiffs must plead that each moving
 4 Defendant had their “trust and confidence” or the use of a power of attorney, and that each
 5 moving Defendant used such trust and confidence or power of attorney to “obtain control,
 6 through deception ... over the money, assets or property of the older person,” or to “convert
 7 money, assets or property of the older person” NRS 41.1395(4)(b)(1)-(2).

8 Plaintiffs have not pled that the moving Defendants had their “trust and confidence.”
 9 Rather, Plaintiffs appear to base their claim on Compass’s alleged use of “purported powers of
 10 attorney” to service the Loans. Yet elsewhere Plaintiffs allege that Defendants lacked a valid
 11 power of attorney. (2AC, para. 66.)

12 Plaintiffs cannot have it both ways: Absent a power of attorney, or facts demonstrating
 13 that Plaintiffs placed their “trust and confidence” in the moving Defendants, Plaintiffs’ claim is
 14 subject to dismissal. NRS 41.3195(4)(b). If the Court permits Plaintiffs to rely upon Compass’s
 15 “purported powers of attorney” as grounds for an elder abuse claim, the claim should lie only
 16 against those entities which actually held the purported powers of attorney --- Compass Partners,
 17 LLC and Compass USA SPE, LLC --- not those additional Defendants who were merely their
 18 alleged agents, investors, owners, or remote owners. The facts as pled simply do not satisfy the
 19 elements of the statute, and this claim must be dismissed.

20 d. **Plaintiffs’ claims for breach of contract, tortious breach of the implied**
covenant of good faith and fair dealing, breach of fiduciary duty,
conversion, and attorney’s fees pursuant to the LSAs should be
dismissed as to certain moving Defendants.

23 It is well established that all contracts in Nevada impose upon the parties an implied
 24 covenant of good faith and fair dealing, “which prohibits arbitrary or unfair acts by one party that
 25 work to the disadvantage of the other.” *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427
 26 (2007). Violation of this covenant is a contractual breach, unless there is a “special relationship”
 27

28 ¹⁷ Plaintiffs have not alleged that they were otherwise “vulnerable persons” within the meaning of the statute,
 or that they suffered “abuse or neglect” as those terms are defined. (2AC, para. 188-190.)

1 between the contracting parties. *Insurance Co. of the West v. Gibson Tile Co.*, 122 Nev. 455,
 2 461, 134 P.3d 698, 702 (2006). “Tort liability for breach of the implied covenant of good faith
 3 and fair dealing is appropriate where the party in the superior or entrusted position has engaged
 4 in grievous and perfidious misconduct.” *State v. Sutton*, 120 Nev. 972, 989, 103 P.3d 8, 20
 5 (2004).¹⁸ Conversion requires proof that the defendant committed a distinct, wrongful act of
 6 dominion over the plaintiff’s personal property in denial of, or inconsistent with --- and in
 7 derogation, exclusion, or defiance of --- the plaintiff’s title or rights therein. *Evans v. Dean*
 8 *Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000). The elements of breach of fiduciary
 9 duty are a fiduciary duty, breach, proximate cause, and damages. *Mosier v. S. Cal. Physicians*
 10 *Ins. Exch.*, 74 Cal. Rptr. 2d 550 (1998). Lastly, Plaintiffs seek an award of fees pursuant to the
 11 alleged breach of the LSAs, which is in essence simply a re-stated breach of contract claim under
 12 the LSAs. (See 2AC, para. 234-235.)

13 Compass Partners, LLC acquired the Purchased Assets, including the servicing rights
 14 under the LSAs, from the Bankruptcy Court. (2AC, para. 47.) It then assigned the servicing
 15 rights to Compass USA SPE, LLC. (Id., para. 77.) None of the other moving Defendants were
 16 even arguably parties to the LSAs. Accordingly, none of the other moving Defendants are
 17 subject to a claim for breach of contract, breach of the implied covenant of good faith and fair
 18 dealing, or attorney fees under the LSAs.

19 The same holds true with respect to Plaintiffs’ claims for breach of fiduciary duty and
 20 conversion.¹⁹ There is no allegation that moving Defendants Friedman, Compass Financial
 21 Partners, LLC (DE and NV), Compass FP Corp., Compass USA GP, LLC, Compass USA
 22

23 ¹⁸ Instances where a special relationship does exist include “those between insurers and insureds, partners of
 24 partnerships, and franchisees and franchisers. Each of these relationships shares a special element of reliance
 25 common to partnership, insurance, and franchise agreements.” *Gibson*, 122 Nev. at 462, 134 P.3d at 698; see also
 26 *Great Am. Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 355, 934 P.2d 257, 263 (1997) (reliance due to special
 27 relationship in those relationships formed by employment, bailment, insurance, partnership, and franchise
 28 agreements). Courts have held that “[t]he implied covenant tort is not available to parties of an ordinary commercial
 transaction where the parties deal at arms’ length.” *Lawrence v. Aurora Loan Servs. LLC*, 2010 U.S. Dist. LEXIS
 5373, *32 (E.D. Cal. Jan. 25, 2010). They have also held that a loan servicer does not have a “special relationship”
 with a borrower. *Contreras v. Master Fin., Inc.*, 2010 U.S. Dist. LEXIS 118017 (D. Nev. Nov. 4, 2010).

29 ¹⁹ The moving Defendants do not concede that these claims are proper as to Compass Partners, LLC,
 30 Compass USA SPE, LLC, Piskun, or Blatt but are not seeking dismissal as to those Defendants at this time.

1 Holding, LLC, Compass USA, LP, EGG or Repotex were actually parties to the LSAs, and no
 2 allegations of fact supporting the concept that they, individually, breached fiduciary duties owed
 3 to Plaintiffs or converted Plaintiffs' personal property.

4 e. **Plaintiffs' civil conspiracy claim is not supported by adequate facts.**

5 A civil conspiracy requires a combination of two or more persons who, by some
 6 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,
 7 resulting in damage. *Sutherland v. Gross*, 105 Nev. 192, 772 P.2d 1287, 1290 (1989).

8 The sine qua non of a conspiratorial agreement is the knowledge on the part of the
 9 alleged conspirators of its unlawful objective and their intent to aid in achieving that
 10 objective. The alleged facts must show either expressly or by reasonable inference that
 11 Defendant had knowledge of the object and purpose of the conspiracy, that there was an
 12 agreement to injure the Plaintiff, that there was a meeting of the minds on the objective
and course of action, and that as a result one of the defendants committed an act resulting
in the injury.

13 *Ungaro v. Desert Palace, Inc.*, 732 F. Supp. 1522, 1532 (D. Nev. 1989) (internal citation
 14 omitted) (emphasis supplied).

15 With respect to each moving Defendant, Plaintiffs have failed to alleged sufficient facts
 16 demonstrating an actual agreement to injure Plaintiffs, or a meeting of the minds on the objective
 17 and course of action. As explained by this Court in *Ungaro*:

18 In *Bliss v. Southern Pacific Co.*, 212 Or. 634, 321 P.2d at 327 (1958), the court stated
 19 that:

20 the primary purpose of a conspiracy must be to cause injury to another. . . . So
 21 long as the object of the combination is to further its own fair interest or
 22 advantage, and not the injury of another, its members are not liable for any injury
 which is merely incidental.

23 The purpose requirement is related to what is referred to as a "malice" requirement which
 24 " . . . does not mean merely ill will. It means the intentional doing of an injurious act
 25 without justification or excuse." *Bliss*, 212 Or. 634, 321 P.2d at 328. An act may also be
 26 the basis for a civil conspiracy when, although done without a direct intention to injure
 27 another, it is "done to benefit the conspirators, [and] its natural and necessary
 28 consequences is the prejudice of the public or the oppression of individuals. *Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 396 P.2d 855, 859-60 (1964).

27 *Ungaro*, 732 F. Supp. at 1532 n.3.

1 In the instant case, Plaintiffs have not come close to meeting the particularized pleading
 2 standard applicable here. They have not alleged the required facts with the specificity necessary
 3 to proceed with a conspiracy claim against the moving Defendants.

4 **5. Defendants Friedman, Compass Financial Partners, LLC (DE), Compass FP**
 5 **Corp., Compass USA GP, LLC, Compass USA Holding, LLC, Compass**
 6 **USA, LP, EGG, and Repotex, Inc. are not subject to personal jurisdiction in**
this Court.

7 The only moving Defendants whom Plaintiffs allege actually engaged in any conduct in
 8 Nevada are Compass Partners, LLC (which acquired the Purchased Assets from the Bankruptcy
 9 Court in Nevada), Compass USA SPE, LLC (which was assigned the Purchased Assets),
 10 Compass Financial Partners, LLC (Nevada) (which allegedly acted as a loan sub-servicer).
 11 There are no allegations that Friedman, Compass FP Corp., Compass USA GP, LLC, Compass
 12 USA Holding, LLC, Compass USA, LP, EGG, or Repotex, Inc. actually engaged in any conduct
 13 in this State --- merely generalized allegations which lump them all in together as "Compass" or
 14 "Defendants". Those Defendants should be dismissed for lack of personal jurisdiction.

15 **a. Plaintiffs' federal and Nevada RICO allegations, and their conspiracy**
 16 **allegations, are insufficient to establish personal jurisdiction.**

17 The federal RICO Act authorizes nationwide service of process under 18 U.S.C 1965,
 18 which allows courts to acquire jurisdiction over defendants who do not have minimum contacts
 19 with the state where the federal court is located. However, nationwide RICO service is "not
 20 unlimited":

21 "For nationwide service to be imposed under section 1965(b), the court must have
 22 personal jurisdiction over at least one of the participants in the alleged multidistrict
conspiracy and the plaintiff must show that there is no other district in which a court will
have personal jurisdiction over all of the alleged co-conspirators." *Butcher's Union Local*
 23 498, 788 F.2d at 539. It is also necessary, for nationwide service of process, that the
complaint state a claim under civil RICO and that the ends of justice require nationwide
service. 18 U.S.C. § 1965(b).

24 *Does I-60 v. Republic Health Corp.*, 669 F. Supp. 1511, 1517-1518 (D. Nev. 1987). See also
 25 *Rocawear Licensing LLC v. Pacesetter Apparel Group*, 2007 U.S. Dist. LEXIS 98894 (C.D. Cal.
 26 Sept. 12, 2007) (discussing the requirements for demonstrating personal jurisdiction over RICO
 27 defendants). Thus, even if the Court does not dismiss Plaintiffs' federal RICO claim, it is not
 28

1 enough under 18 U.S.C. 1965 to simply allege that defendants have participated in a RICO
 2 conspiracy. Plaintiffs must demonstrate: (1) that they have sufficiently alleged a
 3 multidistrict/nationwide conspiracy that encompasses the defendants; (2) that the court has
 4 personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy;
 5 and (3) that there is no other district in which a court will have personal jurisdiction over all of
 6 the alleged co-conspirators. *Republic Health Corp.*, 669 F. Supp. at 1517-1518.

7 Under the first element, in order to sufficiently plead the existence of a nationwide
 8 conspiracy among Defendants, a plaintiff must plead sufficient facts demonstrating that each
 9 defendant intended to enter into an agreement or that the defendant had knowledge of the nature
 10 of the conspiracy, and that the conspirator intended to further an endeavor that would satisfy the
 11 elements of a substantive criminal offense/RICO enterprise. See *Moore v. Kayport Package*
 12 *Express*, 885 F.2d 531, 541 (9th Cir. 1989) (“The RICO claim in the investors’ proposed third
 13 amended complaint does not attribute specific conduct to individual defendants. ... This is not
 14 sufficient.”) As explained by the Ninth Circuit in *Moore*:

15 The few general allegations of conduct which are apportioned to a particular defendant
 16 are aimed at the stockbroker defendants. These particular charges, however, fail to
 17 specify the time, place, and content of the alleged mail and securities fraud, the predicate
 18 acts on which the RICO claim is based. Furthermore, none of the RICO allegations
 19 identifies the role of the individual defendants in the alleged fraudulent scheme.

20 *Id.*

21 Plaintiffs’ federal RICO allegations involve various individuals and corporate entities
 22 who overwhelmingly reside or principally do business in New York, Connecticut, and Nevada²⁰
 23 conspired to engage in wrongful loan servicing activity with respect to loans made to borrowers
 24

25 Plaintiffs allege that Compass FP Corp. has its principal place of business in California. (2AC, para. 7.)
 26 They alleged that Oakbridge Capital, Inc. has its principal place of business in Delaware. (Id., para. 18.) Plaintiffs
 27 accurately alleged that Piskun now resides in California (id., para. 14), but at he testified during the 892 Case, at the
 28 time of the events described in the Second Amended Complaint he lived in New Jersey and worked in New York.
 The various Citron Defendants are allegedly based in Florida, but the allegations against them appear limited to their
 sale of certain property in connection with the Lake Helen Partners Loan and not a larger RICO conspiracy. (See
 id., para. 36-39.)

1 in unspecified states.²¹ Plaintiffs have referred to numerous Defendants collectively as
 2 “Compass,” but have not sufficiently pled facts indicate that each moving Defendant actually
 3 intended to further an endeavor satisfying the elements of a RICO enterprise, or that each
 4 Defendant agreed to participate in a conspiracy. For example, Plaintiffs describe alleged
 5 wrongdoing with respect to the several loan transactions by “Compass” without describing
 6 specifically how each of the moving Defendants was aware of, or agreed to participate in, a
 7 national conspiracy. Under *Republic Health Corp. and Butcher's Union Local 498*, this is
 8 precisely the sort of case in which the Court should hold that RICO-based national jurisdiction is
 9 indeed not “unlimited.”

10 Plaintiffs also assert a claim for civil conspiracy against all Defendants, including the
 11 moving Defendants. Even if this claim is not dismissed, Plaintiffs’ allegations are far too
 12 generalized to establish personal jurisdiction. The Ninth Circuit has not expressly accepted or
 13 rejected the “conspiracy theory” of personal jurisdiction, and has noted that a “great deal of
 14 doubt” surrounds its legitimacy. *Menalco, FZE v. Buchan*, 602 F. Supp. 2d 1186, 1193-1194 (D.
 15 Nev. 2009), quoting *Chirila v. Conforte*, 47 Fed. Appx. 838, 842, 2002 WL 31105149, at *3 (9th
 16 Cir. 2002) (unpublished).²² The Ninth Circuit has rejected a similar conspiracy theory in the
 17 context of venue. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491 (9th Cir. 1979).

18 **b. Plaintiffs cannot establish specific or general personal jurisdiction**
 19 **over many of the moving Defendants in the absence of statutorily**
 20 **based nationwide jurisdiction arising out of their federal RICO claim.**

21 Absent nationwide federal RICO service, or a “conspiracy theory” of personal
 22 jurisdiction, Plaintiffs have pled insufficient facts to establish personal jurisdiction over
 23 moving defendants Friedman, Compass FP Corp., Compass USA GP, LLC, Compass USA
 24 Holding, LLC, Compass USA, LP, EGG, or Repotex. Plaintiffs have the burden to establish

25 ²¹ Plaintiffs have alleged that the Lake Helena Partners Loan involved property in Florida. (2AC, para. 151.)
 26 They have also alleged that the Fox Hill and Eagle Meadows Loans involved real estate in California. (Id., para.
 27 130.)

28 ²² See also *Yu-Sze Yen v. Buchholz*, 2010 U.S. Dist. LEXIS 42393 (N.D. Cal. Apr. 30, 2010) (declining to
 29 base personal jurisdiction on allegations of conspiracy); *Silver Valley Partners, LLC v. De Motte*, 400 F. Supp. 2d
 30 1262, 1268 (W.D. Wash. 2005) (same).

1 that personal jurisdiction exists. *SEC v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1165
 2 (9th Cir. 2007); *Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir. 1978).²³

3 1. **Plaintiffs cannot establish that general personal jurisdiction**
 4 **exists over certain of the moving Defendants.**

5 Plaintiffs have not alleged facts remotely suggesting that moving Defendants Friedman,
 6 Compass Financial Partners, LLC (DE), Compass FP Corp., Compass USA GP, LLC,
 7 Compass USA Holding, LLC, Compass USA, LP, EGG, or Repotex are subject to general
 8 jurisdiction in Nevada. An individual is subject to general jurisdiction in a forum when he has
 9 conducted activities there which are “substantial” or “continuous and systematic” so that he
 10 may be deemed present in the forum, and hence subject to suit in the forum with respect to any
 11 and all claims asserted against him. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*,
 12 466 U.S. 408, 415-16 (1984). The Ninth Circuit has noted it has “regularly … declined to find
 13 general jurisdiction even where the contacts are quite extensive.” *Amoco Egypt Oil Co. v.*
 14 *Leonis Navigation Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993).

15 The Second Amended Complaint is devoid of any reasonably specific allegations
 16 against the aforementioned moving Defendants which would subject them to general
 17 jurisdiction. The only allegations against them are that they were part and parcel, in some
 18 unstated manner, of a wrongful scheme to enrich themselves at the expense of the direct
 19 lenders.

20 2. **Specific jurisdiction does not exist over certain of the moving**
 21 **Defendants.**

22 The Ninth Circuit recognizes a three-part test to determine whether specific jurisdiction
 23 may be applied to a defendant: “(1) The nonresident defendant must do some act or
 24 consummate some transaction with the forum or perform some act by which he purposefully
 25 avails himself of the privilege of conducting activities in the forum, thereby invoking the

26 23 Plaintiffs allege that Friedman is a “principal” of “Compass”. (2AC, para. 16.) However, in the absence of
 27 the federal RICO jurisdictional argument, “Jurisdiction over an individual director or officer of a corporation may
 28 not be predicated on the court’s jurisdiction over the corporation itself, unless the individual maintains contacts with
 the forum state that would subject him to the coverage of the state’s long arm statute and comport with due process.”
Klein v. Freedom Strategic Partners, LLC, 2009 U.S. Dist. LEXIS 10725, 9-10 (D. Nev. 2009) (quoting *Hoag v.*
Sweetwater Int’l, 857 F. Supp. 1420, 1426 (D. Nev. 1994)).

1 benefits and protections of its laws; (2) the claim must be one which arises out of or results
 2 from the defendant's forum-related activities, and (3) exercise of jurisdiction must be
 3 reasonable." *Doe v. American Nat'l Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997) (internal
 4 citations and quotations omitted). All of these requirements must be met in order for
 5 jurisdiction over the defendant to comply with due process. *Id.*

6 Plaintiffs have not alleged any specific acts or transactions through which Friedman,
 7 Compass Financial Partners, LLC (DE), Compass FP Corp., Compass USA GP, LLC,
 8 Compass USA Holding, LLC, Compass USA, LP, EGG, or Repotex, Inc. purposefully availed
 9 themselves of the privilege of conducting activities in Nevada. All that they have pled are
 10 activities by Compass Partners, LLC, Compass USA SPE, coupled with generalized allegations
 11 of conspiratorial conduct on the part of the other moving Defendants.²⁴

12 Based on the foregoing, the Court should dismiss Plaintiffs' claims against Friedman,
 13 Compass Financial Partners, LLC (DE), Compass FP Corp., Compass USA GP, LLC,
 14 Compass USA Holding, LLC, Compass USA, LP, Economic Growth Group, Inc., and
 15 Repotex, Inc. for lack of personal jurisdiction.

16 **D. Prayer for relief.**

17 Based on the foregoing, the moving Defendants pray for the following relief:

18 1. That Plaintiffs' Second Amended Complaint be dismissed with respect to moving
 19 Defendants Friedman, Compass Financial Partners, LLC (DE), Compass FP Corp., Compass
 20 USA GP, LLC, Compass USA Holding, LLC, Compass USA, LP, Economic Growth Group,
 21 Inc., and Repotex, Inc. for lack of personal jurisdiction.

22 2. That the following claims set forth in Plaintiffs' Second Amended Complaint be
 23 dismissed with respect to the following moving Defendants:

24 ///

25 ///

26 ///

27

28 ²⁴ Plaintiffs have also alleged that Compass Financial Partners, LLC (NV) was formed under Nevada law.
 Thus, the moving Defendants are not making this argument on behalf of that entity.

1	Federal RICO, Nevada RICO, elder abuse pursuant to NRS 41.1395, civil conspiracy	All moving Defendants
2	Breach of contract and breach of the implied covenant of good faith and fair dealing, and attorney's fees pursuant to the LSAs	All moving Defendants except Compass Partners, LLC, and Compass USA SPE, LLC
3	Breach of fiduciary duty and conversion	All moving Defendants except Compass Partners, LLC, Compass USA SPE, LLC, Piskun, and Blatt

4
5 Each of these claims fails to state a plausible claim for relief against the referenced
6 moving Defendants, so all of Plaintiffs' against these moving Defendants, and should be
7 dismissed under Rule 12(b)(6).
8

9 DATED this 22nd day of August, 2011.

10 LAXALT & NOMURA, LTD.
11

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27 USA GP, LLC, Compass USA Holding,
28 LLC, Compass USA, LP, Compass USA
SPE, LLC, Economic Growth Group, Inc.,
Repotex, Inc.

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of LAXALT & NOMURA, LTD., and that on this 22nd day of August, 2011, I caused a true and correct copy of the foregoing to be served:

VIA ELECTRONIC SERVICE

addressed as follows:

*** SEE ATTACHED LIST ***

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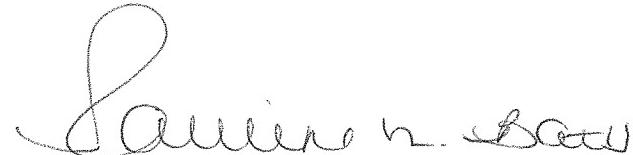
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